

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

In re Application of: Mark A. FELKEY <i>et al.</i>	Confirmation No.: 7571
Application No.: 10/051,282	Examiner: Thien, Maria Teresa T
Filed: January 22, 2002	Group Art Unit: 3627
Attorney Docket No.: WMA01001	

For: METHOD AND SYSTEM FOR PROCURING TELECOMMUNICATIONS
SERVICES ON-LINE

Commissioner for Patents
Alexandria, VA 22313-1450

RESPONSE TO NOTICE OF NON-COMPLIANT APPEAL BRIEF

Dear Sir:

In response to the Notification of Non-Compliant Appeal Brief of March 29, 2011, please amend the Appeal Brief of March 23, 2011 as follows:

II. RELATED APPEALS AND INTERFERENCES

A Decision was rendered by the Board of Patent Appeals and Interferences, on November 24, 2010, in related Application Serial No. 10/051,180, affirming the rejection made by the Examiner and a Decision was rendered by the Board of Patent Appeals and Interferences, on December 24, 2009, in the present Application, affirming the rejection made by the Examiner. Copies of these Decisions are attached hereto.

To the extent necessary, a petition for an extension of time under 37 C.F.R. §1.136 is hereby made. Please charge any shortage in fees due in connection with the filing of this paper, including extension of time fees, to Deposit Account 504213 and please credit any excess fees to such deposit account.

Respectfully Submitted,

DITTHAVONG MORI & STEINER, P.C.

April 21, 2011
Date

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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/051,180	01/22/2002	Mark A. Felkey	WMA01004	9669

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EXAMINER

NGUYEN, DUSTIN

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MARK A. FELKEY, TYLER J. WEST, SUSAN O. DIEMER,
MICHAEL E. MARCELLIN, DIANE L. SABATINI, ELAINE S. MASON,
DAVID K. BRAVERMAN, and PATRICIA A. BOYER

Appeal 2009-005992
Application 10/051,180¹
Technology Center 2400

Before JAMES D. THOMAS, HOWARD B. BLANKENSHIP, and JAY P.
LUCAS, *Administrative Patent Judges*.

LUCAS, *Administrative Patent Judge*.

DECISION ON APPEAL²

¹ Application filed January 22, 2002. Appellants claim the benefit under 35 U.S.C. § 119 of U.S. provisional patent application 60/263,222 filed January 23, 2001. The real party in interest is MCI Inc.

² The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

STATEMENT OF THE CASE

Appellants appeal from a final rejection of claims 1 to 40 under authority of 35 U.S.C. § 134(a). The Board of Patent Appeals and Interferences (BPAI) has jurisdiction under 35 U.S.C. § 6(b).

We affirm the rejection.

Appellants' invention relates to a method of selling telecommunications services online (Spec. ¶ [07]). In the words of Appellants:

[A] logical architecture [is] employed in [a] system for providing software integration for a telecommunications services on-line procurement system In Figure 5, the logical architecture includes a web tier, an application tier, a database tier and a service availability tool.

(Spec. ¶ [44]).

The web tier is responsible for delivering web content (e.g., HyperText Markup Language (HTML) pages, static content, images, Javascript scripts and cascading style sheets, etc[.]) to the client machines.

(Spec. ¶ [45]).

The application tier includes [a] presentation tier framework Functionality from the presentation tier framework ... is leveraged to build a customer portal. This is achieved by reusing and/or configuring the existing JavaServer Pages (JSPs) and objects including transition and display policies of the presentation tier framework.

(Spec. ¶ [48]).

The following claim illustrates the claims on appeal:

Claim 1:

1. A system for providing software integration for on-line procurement of telecommunications offerings, comprising:

a web tier configured to receive a request or a user action from a web server; and

an application tier coupled to the web tier and configured to perform order management, online ordering or user management functions,

wherein the web tier or the application tier includes software objects extended from general-purpose software objects to support procurement of the telecommunications offerings on-line and custom software objects created to support procuring of the telecommunications offerings on-line.

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

Crawford	US 6,014,651	Jan. 11, 2000
Elsbree	US 6,834,388 B1	Dec. 21, 2004
		(filed Mar. 12, 1999)

REJECTION

The Examiner rejects the claims as follows:

Claims 1 to 40 stand rejected under 35 U.S.C. § 103(a) for being obvious over Crawford in view of Elsbree.

We have only considered those arguments that Appellants actually raised in the Briefs. Arguments Appellants could have made but chose not to make in the Briefs have not been considered and are deemed to be waived. *See* 37 C.F.R. § 41.37(c)(1)(vii).

ISSUES

The issues involve whether Appellants have shown that the Examiner erred in rejecting the claims under 35 U.S.C. § 103(a). The first issue specifically turns on whether Crawford and Elsbree render obvious Appellants' claimed "web tier," "application tier," and "software objects extended from general-purpose software objects" (claim 1). The second issue is whether the Examiner properly combined the references.

FINDINGS OF FACT

The record supports the following findings of fact (FF) by a preponderance of the evidence.

Disclosure

1. Appellants have invented a system and method for buying services online. (*See* claim 1.) Appellants' claimed system includes a web tier and an application tier (*id.*). Either the web tier or the application tier includes customizable software objects (*id.*).

Crawford

2. The Crawford reference discloses a system for buying services online. (*See* Abstract; col. 2, ll. 14 to 23; col. 15, ll. 31 to 36.) The system may include two tiers. (*See* col. 3, ll. 22 to 30.) A first tier may be visible to a

customer purchasing online services (col. 3, ll. 22 to 25). A second tier may operate in the background, calling on a database to fulfill a user's request (*id.* at 26 to 30).

Elsbree

3. The Elsbree reference discloses customizable software objects. (*See* col. 6, ll. 19 to 21 and 35 to 39.)

PRINCIPLE OF LAW

Appellants have the burden on appeal to the Board to demonstrate error in the Examiner's position. *See In re Kahn*, 441 F.3d 977, 985-86 (Fed. Cir. 2006).

ANALYSIS

*Arguments with respect to the rejection
of claims 1 to 40
under 35 U.S.C. § 103(a)*

The Examiner has rejected the noted claims as being obvious over the combination of Crawford and Elsbree, pages 3 to 10 of the Examiner's Answer.

Appellants argue the Examiner improperly equates Crawford's access to a virtual disk drive with the claim limitation "application tier coupled to the web tier" or any type of "on-line procurement of telecommunications offerings," as claim 1 requires (App. Br. 11, top).

We disagree with Appellants' argument for the following reasons. We find that Appellants have invented a system and method for buying

services online (FF#1). Appellants' claimed system includes a web tier and an application tier (*id.*). Either the web tier or the application tier includes software objects that are customizable (*id.*). In comparison, the Crawford reference discloses a system for buying services online (FF#2). Crawford generally discloses a system that may include two tiers (*id.*). In Crawford, a first tier (Appellants' claimed "web tier") may be visible to a customer purchasing online services (*id.*). The reference discloses a second tier (Appellants' claimed "application tier") that may function in the background, calling on a database to fulfill a user's request (*id.*). In addition, the Elsbree reference discloses customizable software objects (FF#3).

Our reviewing court has held that nonfunctional descriptive material cannot lend patentability to an invention that would have otherwise been anticipated by the prior art. *In re Ngai*, 367 F.3d 1336, 1339 (Fed. Cir. 2004). *Cf. In re Gulack*, 703 F.2d 1381, 1385 (Fed. Cir. 1983) (when descriptive material is not functionally related to the substrate, the descriptive material will not distinguish the invention from the prior art in terms of patentability).

In accordance with the teachings of *In re Ngai* (cited above), we read Appellants' argued claim phrase "telecommunications offerings" (claim 1) as being nonfunctional descriptive material. That is, the "telecommunications offerings" bear no functional relationship to the limitations of claim 1. Thus, the mere fact that Crawford provides for procurement of any type of services in an online environment suffices to meet the claimed "system for providing software integration for on-line procurement," as recited in the preamble of claim 1. We further note that

Crawford's online services (the claimed "web tier"), which are visible and accessible to customers, are indeed "coupled," as claimed, to a backend database (the claimed "application tier") (FF#2). We find that Crawford's system operates no differently from Appellants' claimed "application tier coupled to the web tier." Accordingly, Appellants have not shown error in the Examiner's conclusion of obviousness in this regard.

Next, Appellants contend that Elsbree's instance object cannot be equated with "software objects extended from general-purpose software objects," as claimed (App. Br. 12, middle).

We do not agree with Appellants. We note that Elsbree is merely cited by the Examiner for disclosing widely known software programming methodologies. (*See* FF#3.) More particularly, the Examiner has pointed to "real-time interactive control and communication software objects" that "have interactive capabilities." (Col. 6, ll. 14 to 19). We find that Elsbree's above-stated disclosure reads on the claim limitation "software objects extended from general-purpose software objects" of claim 1. Accordingly, we find that Appellants have not shown error in the Examiner's analysis.

"[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." *KSR Int'l. Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007) (quoting *Kahn*, 441 F.3d at 988).

The Examiner finds that Elsbree's customizable software objects would "improve the functionality of Crawford's system by allowing the objects to carry additional information for product collection and distribution." (Ans. 5, top).

Appellants dispute the rationale for combining the Crawford and Elsbree references (App. Br 14, middle). Appellants argue that the rationale is incorrect because there is no need established by any portion of Crawford for reuse of existing codes or for dynamically creating objects in a quicker and more efficient manner (*id.*).

The Supreme Court's ruling in *KSR* extinguished the notion that the teaching-suggestion-motivation (TSM) test was the only means for determining obviousness. The Examiner's proffered rationale for forming the combination of references need not come from the disclosures themselves. Instead, the Examiner has applied common sense in fitting the teachings of the Crawford and Elsbree together like puzzle pieces. (*KSR* at 402) (holding that "[i]t is common sense that familiar items may have obvious uses beyond their primary purposes, and a person of ordinary skill often will be able to fit the teachings of multiple patents together like pieces of a puzzle.") That a person of ordinary skill in the art would consider Elsbree for its disclosure of standardized software programming techniques would not have been beyond the grasp of the skilled artisan, as such an artisan is accorded more than the capabilities of a mere automaton. (*KSR* at 421)(holding that "[a] person of ordinary skill in the art is also a person of ordinary creativity, not an automaton.") Accordingly, we find that Appellants have not shown error in the combination of the references.

In accordance with 37 C.F.R. § 41.37(c)(1)(vii), Appellants separately argue claims 2 to 5 (App. Br. 15 to 18). Appellants argue that the Examiner failed to make a showing for the claimed "reconfigured software objects that include reconfigured JavaServerPages (JSPs), reconfigured transition policies, or reconfigured display objects" of claims 2 and 4 (App. Br. 15 to

16). Appellants further argue that the Examiner failed to make findings for the claimed “custom software objects that include custom JavaServerPages (JSPs), custom transition policies, or custom display objects,” as required by claims 3 and 5 (*id.* at 17 to 18).

We adopt and endorse the Examiner’s findings with respect to the separately argued dependent claims. We refer Appellants to the “Response to Arguments” section of the Examiner’s Answer for further details (Ans. 14 to 15).

CONCLUSION OF LAW

Based on the findings of facts and analysis above, we conclude that Appellants have not shown the Examiner erred in rejecting claims 1 to 40.

DECISION

We affirm the Examiner’s rejection of claims 1 to 40.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

peb

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10/051,282	01/22/2002	Mark A. Felkey	WMA01001	7571

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EXAMINER

THEIN, MARIA TERESA T

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1 UNITED STATES PATENT AND TRADEMARK OFFICE

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4 BEFORE THE BOARD OF PATENT APPEALS
5 AND INTERFERENCES
6

7
8 *Ex parte* MARK A. FELKEY,
9 TYLER J. WEST,
10 SUSAN O. DIEMER,
11 MICHAEL E. MARCELLIN,
12 DIANE L. SABATINI,
13 ELAINE S. MASON,
14 DAVID K. BRAVERMAN, and
15 PATRICIA A. BOYER
16

17
18 Appeal 2009-005423
19 Application 10/051,282
20 Technology Center 3600
21

22
23 Decided: December 22, 2009
24

25
26 Before HUBERT C. LORIN, ANTON W. FETTING, and BIBHU R.
27 MOHANTY, *Administrative Patent Judges*.
28 FETTING, *Administrative Patent Judge*.

29 DECISION ON APPEAL
30

1 STATEMENT OF THE CASE

2 Mark A. Felkey, Tyler J. West, Susan O. Diemer, Michael E. Marcellin,
3 Diane L. Sabatini, Elaine S. Mason, David K. Braverman, and Patricia A.
4 Boyer (Appellants) seek review under 35 U.S.C. § 134 (2002) of a final
5 rejection of claims 1-15, 17, 21-23, 27-30, 32-36, 40, and 41, the only claims
6 pending in the application on appeal.

7 We have jurisdiction over the appeal pursuant to 35 U.S.C. § 6(b)
8 (2002).

9 SUMMARY OF DECISION¹

10 We AFFIRM and ENTER A NEW GROUND OF REJECTION
11 PURSUANT TO 37 C.F.R §41.50(b).

12 THE INVENTION

13 The Appellants invented a method and system for procuring
14 telecommunications offerings on-line (Specification ¶ 02).

¹ Our decision will make reference to the Appellants' Appeal Brief ("App. Br.," filed March 22, 2008) and Reply Brief ("Reply Br.," filed July 25, 2008), and the Examiner's Answer ("Ans.," mailed June 17, 2008), and Final Rejection ("Final Rej.," mailed February 9, 2007).

1 An understanding of the invention can be derived from a reading of
2 exemplary claims 1, 5, 27, 37, and 40, which are reproduced below
3 [bracketed matter and some paragraphing added].

4 1. A computer-implemented method for procuring
5 telecommunications offerings, comprising:

6 [1] receiving a procurement inquiry from a customer
7 application, the procurement inquiry specifying a selected
8 telecommunications offering from a plurality of offerings
9 including voice service, data access service and mobile
10 telecommunications service;

11 [2] providing an option for accessing a network consultant
12 via instant messaging;

13 [3] generating procurement data in response to the
14 procurement inquiry; and

15 [4] transmitting the procurement data to the customer
16 application.

17
18 5. The method of claim 2, further comprising: transmitting the
19 ordering data including at least one of shopping cart data, or
20 order entry data.

21
22 27. A system for procuring and servicing telecommunications
23 offerings, comprising:

24 [1] a customer browser loaded on a customer client
25 computer, the customer browser being configured to submit a
26 procurement inquiry specifying a selected telecommunications
27 offering from among a voice service offering, a data access
28 service offering and a mobile telecommunications offering;

29 [2] a back office browser loaded on a back office client
30 computer, the back office browser being configured to submit a
31 service inquiry specifying a search criteria with respect to an
32 order for a telecommunications offering, wherein a customer
33 agent assigned for servicing a telecommunications offering

1 order is available via instant messaging with the customer client
2 computer; and

3 [3] a server program loaded on a server computer and being
4 configured to receive the procurement and service inquiries,
5 generate procurement data pertaining the to the selected
6 telecommunications offering and service data pertaining to the
7 search criteria, and transmit the procurement and service data.

8

9 37. A method for provisioning services via an on-line system,
10 the method comprising:

11 [1] transmitting a service inquiry from a user;

12 [2] selectively directing the user to a service center;

13 [3] selectively providing a plurality of service options to the
14 user;

15 [4] generating a service order based upon the step of
16 selectively providing the plurality of service options; and

17 [5] confirming the service order.

18

19 40. A method for electronic provisioning of telecommunication
20 services, the method comprising:

21 [1] providing a plurality of options to communicate with a
22 consultant during the provisioning, wherein the options include
23 instant messaging and on-line shared white-boarding, wherein
24 the option is displayed via a customer application to a user;

25 [2] receiving input from the customer application, the input
26 specifying one or more selections of a plurality of
27 telecommunication products;

28 [3] determining whether the selection is valid during the
29 provisioning; and

30 [4] generating an order for the selection based on the
31 determining step.

32

THE REJECTIONS

The Examiner relies upon the following prior art:

Sridhar	US 6,098,108	Aug. 1, 2000
Guidice	US 6,463,420 B1	Oct. 8, 2002
Bansal	US 6,788,949 B1	Sep. 7, 2004
Liljestrand	US 6,853,714 B2	Feb. 8, 2005
Bednarek	US 6,965,868 B1	Nov. 15, 2005

Claims 1-15, 17, 21-23, and 40-41 stand rejected under 35 U.S.C. § 101 as being directed towards non-statutory subject matter.

Claims 1-4, 7-15, 17, 21-23, 35, and 36 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Liljestrand and Bednarek.

Claims 5 and 6 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Liljestrand, Bednarek, and Guidice.

Claims 27-30 and 32-34 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Liljestrand, Bednarek, and Sridhar.

Claims 40 and 41 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Liljestrand and Bansal.

ISSUES

The issues pertinent to this appeal are:

- Whether the Appellants have sustained the burden of showing that the Examiner erred in rejecting claims 1-15, 17, 21-23, and 40-41 under

- 1 35 U.S.C. § 101 as being directed towards non-statutory subject
2 matter.
- 3 ○ This pertinent issue turns on whether the claimed methods
4 satisfy the machine-or-transformation test.
- 5 • Whether the Appellants have sustained the burden of showing that the
6 Examiner erred in rejecting claims 1-4, 7-15, 17, 21-23, 35, and 36
7 under 35 U.S.C. § 103(a) as unpatentable over Liljestrand and
8 Bednarek.
- 9 ○ This pertinent issue turns on whether Liljestrand describes
10 limitations [1], [3], and [4] and further where there is a
11 motivation to combine Liljestrand and Bednarek.
- 12 • Whether the Appellants have sustained the burden of showing that the
13 Examiner erred in rejecting claims 5 and 6 under 35 U.S.C. § 103(a)
14 as unpatentable over Liljestrand, Bednarek, and Guidice.
- 15 ○ This pertinent issue turns on whether there is a motivation to
16 combine Liljestrand, Bednarek, and Guidice.
- 17 • Whether the Appellants have sustained the burden of showing that the
18 Examiner erred in rejecting claims 27-30 and 32-34 under 35 U.S.C.
19 § 103(a) as unpatentable over Liljestrand, Bednarek, and Sridhar.
- 20 ○ This pertinent issue turns on whether there is a motivation to
21 combine Liljestrand, Bednarek, and Sridhar.
- 22 • Whether the Appellants have sustained the burden of showing that the
23 Examiner erred in rejecting claims 40 and 41 under 35 U.S.C.
24 § 103(a) as unpatentable over Liljestrand and Bansal.

- This pertinent issue turns on whether there is a motivation to combine Liljestrand and Bansal.

FACTS PERTINENT TO THE ISSUES

The following enumerated Findings of Fact (FF) are believed to be supported by a preponderance of the evidence.

Facts Related to the Prior Art

Sridhar

01. Sridhar is directed to distributed directory of information related to enhanced communication between computers over a data network (Sridhar 1:10-15).
02. A client system accesses a distributed directory in order to determine whether a communication path to the server computer can use an enhanced communication approach (Sridhar 5:11-19). The remote system is configured to accept communication sent over the network to a first address using a first communication approach (Sridhar 5:28-31). The local computer accepts a first network address for communicating with the remote system and determines information related to the remote system (Sridhar 5:33-36). The determined information includes a second network address for communicating with the remote system (Sridhar 5:36-38). Thus a communication path between the remote and local systems is established and the path includes the second network address (Sridhar 5:38-42).

Guidice

03. Guidice is directed to a conducting electronic commercial transactions over a computer network (Guidice 1:13-14). Guidice is concerned with increasing the convenience and efficiency of an electronic commerce transaction by providing for the tracking of orders within the supplier's website (Guidice 1:66-67 and 2:1-3).

04. Guidice describes a system that provides for the online tracking of orders by providing electronic communication of delivery status information between different carriers and the supplier's web site (Guidice 2:10-24).

Bansal

05. Bansal is directed to a method and system for mobile chat sessions (Bansal 1:13-15). Bansal is concerned with providing a chat feature to mobile users in order to discuss location-dependant issues (Bansal 1:50-57).

06. Bansal describes a method for transferring a chat sessions involving a mobile device from a first chat server, when the mobile device is moving out of range of the first chat server, to a second chat server (Bansal 1:60-63). Bansal further describes chat software includes the functionality of text and voice chat, whiteboard, application sharing, and full-fledged video conferencing (Bansal 1:30-34).

1 *Liljestrand*

2 07. Liljestrand is directed to a method and apparatus for providing
3 enhanced telecommunications services to a subscriber (Liljestrand
4 1:15-17). Liljestrand is concerned with providing users with
5 enhanced telecommunication services with voice-activated or
6 web-activated user interfaces (Liljestrand 2:23-35).

7 08. Liljestrand describes an enhanced services platform that
8 utilizes both a voice-activated and a web-activated user interface
9 (Liljestrand 4:13-15). The enhanced services are revenue
10 generating services (Liljestrand 3:54-59). These services include
11 the virtual administrator features of call waiting and call
12 swapping, the single number access service features of hard
13 forward and VIP routing, the unified messaging service features of
14 email and fax, and the recording service features of recording and
15 play back (Liljestrand 18:Table 1 and 2, 19:Table 2 and 3, and
16 20:Table 4). Once a user is connected to the platform, a virtual
17 administrator takes over to assist the user in requesting and
18 performing all services (Liljestrand 4:18-23). Also upon the user
19 connecting to the platform the system retrieves the user's profile
20 information (Liljestrand 14:27-30). After being greeted by the
21 virtual administrator, the user is prompted to give a command and
22 the virtual administrator responds with confirmations (Liljestrand
23 14:51-55 and 14:63-65). The user is able to speak voice
24 commands to the system and the system will perform these
25 commands (Liljestrand 15:7-11). These commands include
26 administrative functions (15:50-52).

09. Subscriber profile information can be entered, modified, or deleted by the user using the voice-activated or web-activated interfaces (Liljestrand 8:40-43). The web-activated interface further provides user billing information and account status information (Liljestrand 8:43-44). The web-activated interface is further capable of automatically creating new accounts for customers that want to sign up for services (Liljestrand 8:44-47). General administrative functions include changing the feature package that the user is registered for (Liljestrand 16:57-64).

Bednarek

10. Bednarek is directed to systems tools, and methods for promoting commerce in a networked economy (Bednarek 1:15-16).

11. Bednarek describes a virtual retailing system that incorporates the entire shopping experience customers use in purchasing decisions and provides this experience in a virtual environment (Bednarek 10:18-49). For example, a user can select to discuss a sale with a sales agent using instant messaging or video conferencing (Bednarek 11:59-66).

Facts Related To The Level Of Skill In The Art

12. Neither the Examiner nor the Appellants has addressed the level of ordinary skill in the pertinent arts of customer relationship management and telecommunications procurement systems. We will therefore consider the cited prior art as representative of the level of ordinary skill in the art. *See Okajima v. Bourdeau*, 261

1 F.3d 1350, 1355 (Fed. Cir. 2001) (“[T]he absence of specific
2 findings on the level of skill in the art does not give rise to
3 reversible error ‘where the prior art itself reflects an appropriate
4 level and a need for testimony is not shown’”) (quoting *Litton*
5 *Indus. Prods., Inc. v. Solid State Sys. Corp.*, 755 F.2d 158, 163
6 (Fed. Cir. 1985).

7 *Facts Related To Secondary Considerations*

8 13. There is no evidence on record of secondary considerations of
9 non-obviousness for our consideration.

10 PRINCIPLES OF LAW

11 *101 - Bilski*

12 The law in the area of patent-eligible subject matter for process claims
13 has recently been clarified by the Federal Circuit in, *In re Bilski*, 545 F.3d
14 943 (Fed. Cir. 2008) (en banc), *petition for cert. filed*, 77 USLW 3442 (U.S.
15 Jan. 28, 2009) (No. 08-964).

16 The en banc court in *Bilski* held that “the machine-or-transformation test,
17 properly applied, is the governing test for determining patent eligibility of a
18 process under § 101.” *Bilski*, 545 F.3d at 956. The court in *Bilski* further
19 held that “the ‘useful, concrete and tangible result’ inquiry is inadequate [to
20 determine whether a claim is patent-eligible under § 101.]” *Bilski*, 545 F.3d
21 at 959-60.

22 The court explained the machine-or-transformation test as follows: “A
23 claimed process is surely patent-eligible under § 101 if: (1) it is tied to a
24 particular machine or apparatus, or (2) it transforms a particular article into a

1 different state or thing.” *Bilski*, 545 F.3d at 954 (citations omitted). The
2 court explained that “the use of a specific machine or transformation of an
3 article must impose meaningful limits on the claim’s scope to impart patent-
4 eligibility” and “the involvement of the machine or transformation in the
5 claimed process must not merely be insignificant extra-solution activity.”
6 *Bilski*, 545 F.3d at 961-62 (citations omitted).

7 The court declined to decide under the machine implementation branch
8 of the inquiry whether or when recitation of a computer suffices to tie a
9 process claim to a particular machine. *Bilski*, 545 F.3d at 962. As to the
10 transformation branch of the inquiry, however, the court explained that
11 transformation of a particular article into a different state or thing “must be
12 central to the purpose of the claimed process.” *Bilski*, 545 F.3d at 962. As to
13 the meaning of “article,” the court explained that chemical or physical
14 transformation of physical objects or substances is patent-eligible under
15 § 101. *Bilski*, 545 F.3d at 962. The court also explained that transformation
16 of data is sufficient to render a process patent-eligible if the data represents
17 physical and tangible objects, *i.e.*, transformation of such raw data into a
18 particular visual depiction of a physical object on a display. *Bilski*, 545 F.3d
19 at 962-63. The court further noted that transformation of data is insufficient
20 to render a process patent-eligible if the data does not specify any particular
21 type or nature of data and does not specify how or where the data was
22 obtained or what the data represented. *Bilski*, 545 F.3d at 962. (citing *In re*
23 *Abele*, 684 F.2d 902, 909 (CCPA 1982) (process claim of graphically
24 displaying variances of data from average values is not patent-eligible) and
25 *In re Meyer*, 688 F.2d 789, 792-93 (CCPA 1982) (process claim involving

1 undefined “complex system” and indeterminate “factors” drawn from
2 unspecified “testing” is not patent-eligible)).

3
4 *Obviousness*

5 A claimed invention is unpatentable if the differences between it and
6 the prior art are “such that the subject matter as a whole would have been
7 obvious at the time the invention was made to a person having ordinary skill
8 in the art.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007); *Graham*
9 *v. John Deere Co.*, 383 U.S. 1, 13-14 (1966).

10 In *Graham*, the Court held that that the obviousness analysis is
11 bottomed on several basic factual inquiries: “[(1)] the scope and content of
12 the prior art are to be determined; [(2)] differences between the prior art and
13 the claims at issue are to be ascertained; and [(3)] the level of ordinary skill
14 in the pertinent art resolved.” *Graham*, 383 U.S. at 17. *See also KSR*, 550
15 U.S. at 406. “The combination of familiar elements according to known
16 methods is likely to be obvious when it does no more than yield predictable
17 results.” *KSR*, 550 U.S. at 416.

18 ANALYSIS

19 *Claims 1-15, 17, 21-23, and 40-41 rejected under 35 U.S.C. § 101 as*
20 *being directed towards non-statutory subject matter*

21 The Appellants first contend that the there is no case law requiring that
22 the method claims be tied to another statutory class and the claims are
23 directed to computer-implemented steps regardless. Reply Br. 8-10.

1 We disagree with the Appellants. The current test for determining
2 whether a method or process is patent-eligible is the machine-or-
3 transformation test articulated in *Bilski*. *Bilski*, 545 F.3d at 954.

4 The machine prong of the *Bilski* machine-or-transformation test is
5 satisfied by showing that a claimed process is “tied to a particular machine.”
6 *Bilski*, 545 F.3d at 954. Independent claims 1 and 12 recites “a computer-
7 implemented method” in the preamble and independent claim 40 recites only
8 “a method” in the preamble. As such, claim 40 does not recite any machine,
9 much less a particular machine. The remaining bodies of claims 1 and 12
10 fail to recite any further structure and the recitation of “a computer-
11 implemented method” in the preamble is merely a nominal recitation of a
12 computer or machine. Although this phrase ties the claimed process to a
13 computer per se, it does not tie the process to any particular computer or
14 particular machine. By this phrase, claims 1 and 12 cover tying the process
15 to any general-purpose computer. Dependant claims 1-11, 13-15, 17, 21-23,
16 and 41 fail to recite any further limitations that tie the method to a particular
17 machine and therefore also fail the machine prong of the machine-or-
18 transformation test. As such, the claims 1-15, 17, 21-23, and 40-41 fail to
19 satisfy the machine prong of the machine-or-transformation test.

20 The Appellants further contend that there is a transformation described
21 in the claims. Reply Br. 8-10. The Appellants specifically argue that the
22 method transforms a procurement inquiry from a customer application, via
23 intermediate steps, into procurement data that is transmitted to the customer
24 application in response to the procurement inquiry. Reply Br. 9.

1 We disagree with the Appellants. The method, as argued by the
2 Appellants, transforms a data from a procurement inquiry into procurement
3 data. Reply Br. 9. That is, the transformation only involves the
4 transformation of data. The transformation of data is sufficient to render a
5 process patent-eligible if the data represents physical and tangible objects
6 and the transformation of data is insufficient to render a process patent-
7 eligible if the data does not specify any particular type or nature of data and
8 does not specify how or where the data was obtained or what the data
9 represented. *Bilski*, 545 F.3d at 962. Claims 1-15, 17, 21-23, and 40-41
10 recite a method for procuring telecommunications offerings. The data in
11 these claims is procurement inquiry data and procurement data. Inquiry data
12 and procurement data do not represent physical and tangible objects.
13 Inquiry and procurement data merely represent information and are not
14 physical entities. As such, the recited methods are insufficient to render this
15 method for procuring telecommunications offerings patent-eligible.

16 The Appellants have not sustained the burden of showing that the
17 Examiner erred in rejecting claims 1-15, 17, 21-23, and 40-41 under 35
18 U.S.C. § 101 as being directed towards non-statutory subject matter.

19
20 *Claims 1-4, 7-15, 17, 21-23, 35, and 36 rejected under 35 U.S.C. §*
21 *103(a) as unpatentable over Liljestrand and Bednarek*

22 The Appellants first contend that (1) Liljestrand fails to describe
23 limitation [1] of claim 1, specifically because Liljestrand fails to describe a
24 procurement inquiry by a customer application as required by claims 1, 12,
25 21, 35, and 36. App. Br. 8-9 and Reply Br. 3-7. We disagree with the

1 Appellants. Limitation [1] requires that receiving a procurement inquiry
2 from a customer that specifies a selected telecommunication offering.
3 Liljestrand describes a system that provides revenue generating, enhanced
4 telecommunications services to users. FF 08. The system allows users to
5 submit requests through a voice-activated or web-activated interface. FF 08.
6 A web-activated interface is the same as at a browser on the user's
7 computer. The system then receives the user's commands and performs the
8 requested action. FF 08. A user can also request which services to be
9 associated with the user's account. FF 09. That is, Liljestrand describes
10 receiving requests from users, where the requests can include administrative
11 functions such as selecting new telecommunication services to be associated
12 with the user's account. As such, Liljestrand describes limitation [1] of
13 claim 1.

14 The Appellants further contend that the Examiner has given an unduly
15 broad and unreasonable interpretation to the claims, specifically because it is
16 unreasonable to conclude that procurement limitations are broad enough to
17 read on the mere disclosure of any system providing telecommunications
18 services and charging for the services. App. Br. 10 and Reply Br. 4-5, 7.
19 We disagree with the Appellants. The specification does not provide for a
20 special definition for "procurement." The plain and ordinary meaning of
21 procurement is the act of obtaining. The Examiner construes Liljestrand's
22 description of requesting or inquiring the system for services and the
23 providing of those services to the user as an act of obtaining services from
24 the system. This is a reasonable construction of the term and is consistent
25 with the plain and ordinary meaning of procurement. The act of requesting a
26 service is functionally the same as inquiring about procuring the service.

1 The Examiner's construction of the phrase generating procurement data as
2 adding a service to a user's account, generating a bill for the service, and
3 providing the service to the user is also reasonable under the broadest
4 interpretation. As such, the Examiner's construction of a procurement
5 inquiry and procurement data is reasonable and proper.

6 The Appellants also contend that (2) Liljestrand fails to describe
7 limitation [3] of claim 1 (App. Br. 9) and (3) Liljestrand fails to describe
8 limitation [4]. We disagree with the Appellants. Limitation [3] requires
9 generating procurement data in response to the procurement inquiry.
10 Limitation [4] further requires transmitting the procurement data to the
11 customer. As discussed *supra*, the Examiner has construed the phrase
12 generating procurement data, from limitation [3], as adding a service to a
13 user's account, generating a bill for the service, and providing the service to
14 user. We found this construction to be reasonable. Liljestrand describes the
15 functionality of allowing a user to add an enhanced service to the user's
16 account for which the user will be billed and providing that service to the
17 user. FF 08-09. Providing the service to the user is the same as transmitting
18 procurement data to the customer. As such, Liljestrand describes limitations
19 [3] and [4] of claim 1.

20 The Appellants even further contend that (4) Liljestrand fails to describe
21 that a selected telecommunications offering from a plurality of offerings.
22 Reply Br. 4. Specifically, the Appellants contend that Liljestrand does not
23 suggest any menu of offerings from which a customer application makes a
24 selection. We disagree with the Appellants. The independent claims do not
25 require a feature of a menu of offerings from which a customer application
26 makes a selection and therefore the argument that Liljestrand fails to

1 describe a menu of offerings is not persuasive. As such, we find no reason
2 to read this limitation in to the claims. Furthermore, Liljestrand describes
3 several enhanced services that are available for a user to select from such as
4 those described in tables 1-4. FF 08. As such, the availability of these
5 services for a user to select from is selecting an offering from a plurality of
6 offerings.

7 The Appellants further contend that (5) there is no motivation to
8 combine Liljestrand and Bednarek. Reply Br. 6. We disagree with the
9 Appellants. Liljestrand is concerned with providing users with enhanced
10 services. FF 07. Liljestrand accomplishes this by providing a system that
11 allows users to utilize a voice-activated or a web-activated interface in using
12 and purchasing enhanced services. FF 08-09. Bednarek is also concern with
13 the promotion of commerce and Bednarek accomplishes this by providing a
14 system with enhanced features that simulate the overall real-world shopping
15 experience in a virtual environment. FF 10-11. For example, Bednarek
16 simulates the real-world experience of shopping with a sales agent by
17 providing communication with a sales agent using instant messaging or
18 video conferencing. FF 11. A person with ordinary skill in the art would
19 have recognized to combine Liljestrand and Bednarek in order to increase
20 customer service and customer relationships by including an option for
21 accessing a network consultant or sales agent via instant messaging.
22 Liljestrand and Bednarek are concern with the same type of problem and a
23 person with ordinary skill in the art would have been lead to combine their
24 teachings.

1 The Appellants have not sustained the burden of showing that the
2 Examiner erred in rejecting claims 1-4, 7-15, 17, 21-23, 35, and 36 under 35
3 U.S.C. § 103(a) as unpatentable over Liljestrand and Bednarek.

4
5 *Claims 5 and 6 rejected under 35 U.S.C. § 103(a) as unpatentable over*
6 *Liljestrand, Bednarek, and Guidice*

7 The Appellants first contend that (1) Liljestrand fail to describe the
8 features of a procurement inquiry, a generation of procurement data, and a
9 transmission of the procurement data for the same reasons argued *supra*.
10 App. Br. 12. We disagree with the Appellants. These arguments were not
11 found persuasive *supra* and are not found persuasive here for the same
12 reasons.

13 The Appellants further contend that (2) there is no reason to combine
14 Guidice to Liljestrand and Bednarek to include the feature of a shopping
15 cart. App. Br. 12-13 and Reply Br. 6. We disagree with the Appellants. As
16 discussed *supra*, Liljestrand and Bednarek are concerned with providing
17 users with enhanced services (FF 07) and accomplish this by providing a
18 system that allows users to utilize a voice-activated or web-activated
19 interface in using and purchasing enhanced services (FF 08 and FF 09) and a
20 system with enhanced features that simulate the overall real-world shopping
21 experience in a virtual environment (FF 10 and FF 11). Guidice is also
22 concerned with providing users with the enhanced services and specifically
23 concerned with providing users with a system that has enhanced tracking
24 services. FF 03. Guidice accomplishes this by providing a system that
25 provides for the online tracking of orders by providing electronic

1 communication of delivery status information between different carriers and
2 the supplier's web site. FF 04. A person with ordinary skill in the art would
3 have recognized the benefit of enhancing order tracking services by enabling
4 users to track the shipping status of orders on the supplier's web site. A
5 person with ordinary skill in the art would have found it obvious to combine
6 Guidice to Liljestrand and Bednarek in order achieve this benefit. As such,
7 Liljestrand, Bednarek, and Guidice are concerned with the same problem
8 and a person with ordinary skill in the art would have been lead to combine
9 their teachings.

10 The Appellants have not sustained the burden of showing that the
11 Examiner erred in rejecting claims 5 and 6 under 35 U.S.C. § 103(a) as
12 unpatentable over Liljestrand, Bednarek, and Guidice.

13
14 *Claims 27-30 and 32-34 rejected under 35 U.S.C. § 103(a) as*
15 *unpatentable over Liljestrand, Bednarck, and Sridhar*

16 The Appellants first contend that (1) Liljestrand fail to describe the
17 features of a procurement inquiry, a generation of procurement data, and a
18 transmission of the procurement data for the same reasons argued *supra* and
19 Sridhar fails to provide for these deficiencies. App. Br. 13. We disagree
20 with the Appellants. These arguments were not found persuasive *supra* and
21 are not found persuasive here for the same reasons.

22 Furthermore, the Appellants argument that Sridhar fails to describe these
23 features is not persuasive because Appellants are responding to the rejection
24 by attacking the references separately, even though the rejection is based on
25 the combined teachings of the references. Nonobviousness cannot be

1 established by attacking the references individually when the rejection is
2 predicated upon a combination of prior art disclosures. *See In re Merck &*
3 *Co. Inc.*, 800 F.2d 1091, 1097, (Fed. Cir. 1986).

4 The Appellants further contend that (2) there is no reason to combine
5 Sridhar to Liljestrand and Bednarek. App. Br. 13-14. We disagree with the
6 Appellants. As discussed *supra*, Liljestrand and Bednarek are concerned
7 with providing users with enhanced services (FF 07) and accomplish this by
8 providing a system that allows users to utilize a voice-activated or web-
9 activated interface in using and purchasing enhanced services (FF 08 and FF
10 09) and a system with enhanced features that simulate the overall real-world
11 shopping experience in a virtual environment (FF 10 and FF 11). Sridhar is
12 also concerned with providing enhanced user services. FF 01. Sridhar
13 accomplishes this by providing a system that includes an enhanced
14 communication approach between two computer systems. FF 02. A person
15 with ordinary skill in the art would have recognized to combine Sridhar to
16 Liljestrand and Bednarek in order to enhance computer communication by
17 implementing the features of having a customer browser loaded on a
18 customer client computer, a back office browser loaded on a back office
19 client computer, and having the server program communicate according to a
20 communication protocol architecture. As such, a person with ordinary skill
21 in the art would have been lead to combine Sridhar to Liljestrand and
22 Bednarek and would have found their combination obvious.

23 The Appellants have not sustained the burden of showing that the
24 Examiner erred in rejecting claims 27-30 and 32-34 under 35 U.S.C.
25 § 103(a) as unpatentable over Liljestrand, Bednarek, and Sridhar.

*Claims 40 and 41 rejected under 35 U.S.C. § 103(a) as unpatentable
over Liljestrand and Bansal*

The Appellants first contend that (1) Liljestrand fails to describe the features of a procurement inquiry, a generation of procurement data, and a transmission of the procurement data for the same reasons argued *supra* and Bansal fails to provide for these deficiencies. App. Br. 15. We disagree with the Appellants. These arguments were not found persuasive *supra* and are not found persuasive here for the same reasons.

Furthermore, the Appellants argument that Sridhar fails to describe these features is not persuasive because Appellants are responding to the rejection by attacking the references separately, even though the rejection is based on the combined teachings of the references. Nonobviousness cannot be established by attacking the references individually when the rejection is predicated upon a combination of prior art disclosures. App. Br. 15.

The Appellants further contend that (2) there is no reason to combine Bansal and Liljestrand. App. Br. 15 and Reply Br. 7. We disagree with the Appellants. As discussed *supra*, Liljestrand is concerned with providing users with enhanced services (FF 07) and accomplishes this by providing a system that allows users to utilize a voice-activated or web-activated interface in using and purchasing enhanced services (FF 08-09). Bansal is also concerned with providing users with an enhanced service and is specifically concerned with providing an enhanced chat service. FF 05. Bansal accomplishes this by providing a method for transferring a chat session, on a mobile device, from a first chat server to a second chat server

1 when the mobile device is moving out of range of the first chat server. FF
2 06. Bansal further describes that the chat features of text and video chats
3 and whiteboards. FF 06. A person with ordinary skill in the art would have
4 recognized to combine Bansal to Liljestrand in order to facilitate
5 communication by providing the alternative communication means of instant
6 messaging and whiteboards. As such, a person with ordinary skill in the art
7 would have found it obvious to combine Liljestrand and Bansal.

8 The Appellants have not sustained the burden of showing that the
9 Examiner erred in rejecting claims 40 and 41 under 35 U.S.C. § 103(a) as
10 unpatentable over Liljestrand and Bansal.

11
12 **NEW GROUND OF REJECTION**

13 The following new ground of rejection is entered pursuant to 37 C.F.R.
14 § 41.50(b). Claim 37 is rejected under 35 U.S.C. § 101 as being directed
15 towards non-statutory subject matter.

16 Claim 37 recites “a method for provisioning services via an on-line
17 system.” Claim 37 further only recites steps and does not tie these steps to a
18 particular machine or apparatus. Although the preamble recites “an on-line
19 system,” the remaining steps fail to recite any further structure and as such
20 the recitation of “an on-line system” is merely a nominal recitation of
21 structure. Although this phrase ties the claimed process to a system per se, it
22 does not tie the process to any particular machine or computer.
23 Additionally, the recites steps are for provision services, including the steps
24 of transmitting data from a user, providing the user with a plurality of
25 options, and receiving data from the user based on the selection of an option.

1 That is, the process is directed towards merely transforming data. The data
2 transformed merely represents information and does not represent any
3 physical or tangible objects. As such, this transformation of data is
4 insufficient to render the claimed process patent-eligible because the data
5 does not represent physical or tangible objects.

6 As such, claim 37 fails to satisfy both prongs of the machine-or-
7 transformation test and is rejected under 35 U.S.C. § 101 as being directed
8 towards non-statutory subject matter.

9
10 **CONCLUSIONS OF LAW**

11 The Appellants have not sustained the burden of showing that the
12 Examiner erred in rejecting claims 1-15, 17, 21-23, and 40-41 under 35
13 U.S.C. § 101 as being directed towards non-statutory subject matter.

14 The Appellants have not sustained the burden of showing that the
15 Examiner erred in rejecting claims 1-4, 7-15, 17, 21-23, 35, and 36 under 35
16 U.S.C. § 103(a) as unpatentable over Liljestrand and Bednarek.

17 The Appellants have not sustained the burden of showing that the
18 Examiner erred in rejecting claims 5 and 6 under 35 U.S.C. § 103(a) as
19 unpatentable over Liljestrand, Bednarek, and Guidice.

20 The Appellants have not sustained the burden of showing that the
21 Examiner erred in rejecting claims 27-30 and 32-34 under 35 U.S.C.
22 § 103(a) as unpatentable over Liljestrand, Bednarek, and Sridhar.

The Appellants have not sustained the burden of showing that the Examiner erred in rejecting claims 40 and 41 under 35 U.S.C. § 103(a) as unpatentable over Liljestrand and Bansal.

A new ground of rejection is entered 37 C.F.R. § 41.50(b) in which claim 37 is rejected under 35 U.S.C. § 101 as being directed towards non-statutory subject matter.

DECISION

To summarize, our decision is as follows.

- The rejection of claims 1-15, 17, 21-23, and 40-41 under 35 U.S.C. § 101 as being directed towards non-statutory subject matter is not sustained.
- The rejection of claims 1-4, 7-15, 17, 21-23, 35, and 36 under 35 U.S.C. § 103(a) as unpatentable over Liljestrand and Bednarek is not sustained.
- The rejection of claims 5 and 6 under 35 U.S.C. § 103(a) as unpatentable over Liljestrand, Bednarek, and Guidice is not sustained.
- The rejection of claims 27-30 and 32-34 under 35 U.S.C. § 103(a) as unpatentable over Liljestrand, Bednarek, and Sridhar is not sustained.
- The rejection of claims 40 and 41 under 35 U.S.C. § 103(a) as unpatentable over Liljestrand and Bansal is not sustained.
- A new ground of rejection is entered pursuant to 37 C.F.R. § 41.50(b).

- 1 ○ Claim 37 is rejected under 35 U.S.C. § 101 as being directed
2 towards non-statutory subject matter is not sustained.

3 Our decision is not a final agency action.

4 In addition to affirming the Examiner's rejection(s) of one or more
5 claims, this decision contains new grounds of rejection pursuant to 37 C.F.R.
6 § 41.50(b). 37 CFR § 41.50(b) provides “[a] new ground of rejection
7 pursuant to this paragraph shall not be considered final for judicial review.”

8 This Decision contains a new rejection within the meaning of 37
9 C.F.R. § 41.50(b) (2007).

10 37 C.F.R. § 41.50(b) also provides that Appellants, WITHIN TWO
11 MONTHS FROM THE DATE OF THE DECISION, must exercise one of
12 the following two options with respect to the new rejection:

13 (1) Reopen prosecution. Submit an appropriate amendment of
14 the claims so rejected or new evidence relating to the claims
15 so rejected, or both, and have the matter reconsidered by the
16 Examiner, in which event the proceeding will be remanded
17 to the Examiner. . . .

18 (2) Request rehearing. Request that the proceeding be reheard
19 under § 41.52 by the Board upon the same record. . . .

20 Should the Appellants elect to prosecute further before the examiner
21 pursuant to 37 CFR § 41.50(b)(1), in order to preserve the right to seek
22 review under 35 U.S.C. §§ 141 or 145 with respect to the affirmed rejection,
23 the effective date of the affirmance is deferred until conclusion of the
24 prosecution before the Examiner unless, as a mere incident to the limited
25 prosecution, the affirmed rejection is overcome.

If the Appellants elect prosecution before the Examiner and this does not result in allowance of the application, abandonment or a second appeal, this case should be returned to the Board of Patent Appeals and Interferences for final action on the affirmed rejection, including any timely request for rehearing thereof.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2007).

AFFIRMED

41.50(b)

mev

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